

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 26,124

In re: 4120 14th Street, N.W., Unit 36

Ward Four (4)

ALYNDA MCDONALD

Tenant /Appellant

v.

DAVID NUYEN¹

Housing Provider/Appellee

DECISION AND ORDER

August 29, 2003

YOUNG, COMMISSIONER. This case is on appeal from the District of Columbia Department of Consumer and Regulatory Affairs (DCRA), Office of Adjudication (OAD), to the Rental Housing Commission (Commission). The applicable provisions of the Rental Housing Act of 1985 (Act), D.C. OFFICIAL CODE §§ 42-3501.01-3509.07 (2001), the District of Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE §§ 2-501-510 (2001), and the District of Columbia Municipal Regulations, 14 DCMR §§ 3800-4399 (1991) govern these proceedings.

I. PROCEDURAL HISTORY

On October 24, 2000, Alynda McDonald, the tenant of unit 36 at the housing accommodation located at 4120 14th Street, N.W., filed Tenant Petition (TP) 26,124 with the Rental Accommodations and Conversion Division (RACD). In her petition the tenant

¹ The tenant incorrectly spelled the name of the housing provider in her tenant petition. The tenant identified the housing provider as David N-u-y-g-e-n. The record reflects that the housing provider's name is correctly spelled N-u-y-e-n. Accordingly, pursuant to 14 DCMR § 3809.3 (1991), the Commission corrects this error on its own motion.

alleged that the housing provider, David Nuyen, doing business as, USA Home Champion Realty: 1) took a rent increase while her unit was not in substantial compliance with the D.C. Housing Regulations; 2) substantially reduced services and/or facilities provided in connection with her unit; 3) directed retaliatory action against her for exercising her rights in violation of section 502 of the Act; and 4) served on her Notices to Vacate that were in violation of section 501 of the Act.

An OAD hearing was held on July 12, 2001, with Hearing Examiner Terry Michael Banks presiding. The hearing examiner issued his decision and order on July 15, 2002. In his decision the hearing examiner made the following relevant findings of fact:

8. Respondent retained American Pest Management, Inc., to exterminate Petitioner's apartment. On April 28, 1999, American Pest Management performed extermination services on Petitioner's unit.
9. When the agent for American Pest Management, Inc., returned several weeks later to perform follow-up service on Petitioner's unit, Petitioner denied access to her apartment.
10. Petitioner denied access to her apartment to Respondent's repairmen on numerous occasions.
- ...
13. Respondent initiated procedures to convert the housing accommodation to condominium units in 1998.
14. Respondent received approval to proceed with the conversion on March 8, 2000.
15. Respondent sent notices to all tenants of the housing accommodation notifying them of their right to purchase their units.
16. Eleven tenants of the housing accommodation signed agreements to purchase their units.
17. Respondent sent notices to vacate to the thirty-four tenants, including Petitioner, who failed to sign purchase agreements for their units.

18. Respondent issued notices to vacate to Petitioner on June 13, 2000 and August 25, 2000.

McDonald v. Nuyen, TP 26,124 (OAD July 15, 2002) at 4-5.

The hearing examiner made the following conclusions of law:

1. Respondent's proposed rent increase was unlawful because the Respondent had not complied with an outstanding D.C. Superior Court order to achieve complete abatement of housing deficiencies before initiating rent increase procedures.
2. Petitioner has failed to establish that services or facilities have been substantially reduced, because the facilities reduced were not substantial and Petitioner obstructed Respondent's reasonable attempts to cure the deficiencies.
3. Petitioner has failed to establish that Respondent retaliated against her within the meaning of the Act, because the evidence reveals that Petitioner was treated no differently than any of the other thirty-four tenants who declined to purchase their rental units during the conversion of the housing accommodation to condominiums.
4. Respondent's notices to quit issued to Petitioner on June 13, 2000 and August 25, 2000 did not comply with the requirements of D.C. [Official] Code § 42-3505.01(a) and (e) (2001).

Id. at 9-10 (footnote omitted).

II. ISSUES ON APPEAL

On July 11, 2002, the tenant filed a timely notice of appeal. The notice is in narrative form and asserts that the hearing examiner's decision contains errors, and raises the following issues:

1. Whether, contrary to the decision, the tenant obstructed the housing provider's efforts to perform maintenance on her unit.
2. Whether the housing provider produced any evidence to show that American Pest Control or any other professional extermination service returned to her unit to abate the rodent infestation.

3. Whether the hearing examiner erred when he stated that 24 of the 26 outstanding housing code violations, as reported in D.C. Housing Inspection notices, had been abated.
4. Whether, contrary to the hearing examiner's decision, the record contains evidence of the housing provider's attempts to increase her rent, including the dates of notice of increase and the amounts requested.
5. Whether the hearing examiner erred when he failed to establish that the tenant was offered the right of first refusal on her unit, in that no evidence was offered at the hearing by the housing provider to establish that the tenant received the proper notice.

III. DISCUSSION OF THE ISSUES

A. Whether the hearing examiner erred when he found that the tenant obstructed the housing provider's efforts to perform maintenance on her unit.

In his decision and order, the hearing examiner stated:

Petitioner confirmed that she did not always provide access to her unit, but testified that her actions were justified because the building manager, Armando Sanchez, had physically threatened her and had insulted her on more than one occasion. Respondent testified that this excuse was a pretext, and that even when other repairmen were sent to her unit, Petitioner failed to provide access. While there was considerable testimony about the number of times the D.C. Metropolitan Police were called to Petitioner's unit, she did not testify that she had ever filed an official complaint against Mr. Sanchez, or had sent a written complaint to the Respondent complaining of Mr. Sanchez' actions. In light of Mr. Sanchez' vociferous denials that he had ever threatened, insulted, or harassed Petitioner, and in the absence of any corroborating evidence of such mistreatment, the Hearing Examiner finds that Petitioner intentionally obstructed Respondent's efforts to perform maintenance on her unit.

McDonald v. Nuyen, TP 26,124 (OAD July 15, 2002) at 7.

Here, the tenant and the housing provider offered conflicting versions of facts concerning access to the tenant's unit in order to make repairs. The hearing examiner made a credibility determination in the housing provider's favor regarding whether the tenant obstructed the housing provider's efforts to perform maintenance on her unit.

Findings of credibility by the hearing examiner “should not be disturbed if they are supported by substantial evidence in the record as a whole.” Eilers v. Bureau of Motor Vehicles Servs., 583 A.2d 677, 684 (D.C. 1990).

The hearing examiners are entrusted with a degree of latitude in deciding how they shall evaluate and credit the evidence. Harris v. District of Columbia Rental Hous. Comm’n, 505 A.2d 66 (D.C. 1986). With regard to credibility determinations, the Commission defers to the hearing examiner, who alone, as the trier of fact, “has an opportunity to observe the witnesses” and to get a “feel for the evidence.” Eilers, 583 A.2d at 684. Further, as the reviewing body, the Commission’s role is not to weigh the testimony and substitute its judgment for that of the fact-finder who received the evidence and determined the weight to be accorded such evidence. Communication Workers v. District of Columbia Comm’n on Human Rights, 367 A.2d 149, 152 (D.C. 1976) cited in Turner v. Tscharner, TP 27,014 (RHC June 13, 2001); Gray v. Davis, TP 23,081 (RHC Dec. 7, 1993).

The record evidence supporting the hearing examiner’s conclusion includes unrefuted testimony at the hearing that the tenant changed the locks to her unit but failed to provide the housing provider or his housing manager, Mr. Sanchez, a key to gain access to her unit. Further, a letter dated April 5, 2001, from the housing provider to the tenant, states:

This letter is to inform you that, due to the continuous water leaks from the bathroom in your apartment to the apartment below you, you are requested to give us access to your apartment immediately. Failure to do so in the timely manner [sic] will create more damages to us and you will be requested to pay for these damages. This is our final request. Our manager has contacted you three times verbally and you have refused to give him access to your apartment.

Record (R.) at 74. Based on the foregoing evidence, the hearing examiner determined

that the testimony of the housing provider and his witness, Mr. Sanchez, concerning the tenant's refusal to permit the housing provider access to do repairs, was more credible than that of the tenant.

Accordingly, the Commission concludes that there is substantial evidence in the record to support the hearing examiner's decision that the tenant refused access to the housing provider's repairmen, and therefore his decision is affirmed.

B. Whether the hearing examiner erred when he failed to find that the tenant suffered a reduction in services or facilities in light of the fact that the rodent infestation in her unit was never abated.

The hearing examiner stated in his decision:

Petitioner has failed to establish that services or facilities have been substantially reduced. At the time of the filing of the Petition, the only outstanding deficiencies related to rodent infestation. While the infestation may not have been completely eliminated, the Hearing Examiner finds that the Respondent made reasonable efforts to solve the problem, that the infestation has been mitigated if not completely abated, and that Petitioner denied access to her unit for follow-up treatments. A tenant has an obligation to provide the housing provider reasonable access to the housing accommodation to perform the necessary repairs and to otherwise cooperate with the housing provider in having repairs performed. In light of the finding that services and facilities have not been substantially reduced, Petitioner is not entitled to a refund in rent for the reduction in services.

McDonald v. Nuyen, TP 26,124 (OAD July 15, 2002) at 7. Therefore, the hearing examiner denied the tenant's claim of a reduction of services or facilities based upon her refusal to provide access to the housing provider in order to eliminate the rodent infestation. The tenant contends that the hearing examiner's conclusion is not supported by record evidence. The Commission agrees.

The evidence reflects that American Pest Management, Inc., made a single visit to the tenant's unit on April 28, 1999. The tenant provided un rebutted testimony that the

rodent infestation continued after the initial extermination. The housing provider failed to provide evidence that he took additional steps to correct the rodent infestation. The tenant testified and the record reflects that she barred three (3) of the housing provider's workmen from her unit. There was no evidence or testimony presented that the tenant attempted to bar the technician from American Pest Management, Inc.

The regulations provide a list of housing code violations which, if found to exist, are considered to be "substantial" violations of the housing code. The applicable regulation, 14 DCMR § 4216.2 (1991), states in relevant part:

For purposes of this subtitle, substantial compliance with the housing code means the absence of any substantial housing violations as defined in § 103(35) of the Act, including but not limited to, the following:

(i) Infestation of insects or rodents (emphasis added).

In the instant case, the housing provider had knowledge of the substantial housing code violation from 1997, however, he failed to correct the substantial violation of rodent infestation. Therefore, the hearing examiner's conclusion that, "the infestation may not have been completely eliminated," and "the Respondent made reasonable efforts to solve the problem," are not sufficient absent a showing, in the record evidence, that the tenant prevented the housing provider from correcting the violation. As previously stated, the record evidence reflects that the housing provider supplied the tenant with extermination services on one occasion. However, the substantial evidence in the record also reflects that the rodent infestation in the tenant's unit was not corrected by that single extermination.

The Act, D.C. OFFICIAL CODE § 42-3509.01 (2001) provides, in part:

Any person who knowingly ... substantially reduces or eliminates related services previously provided for a rental unit, shall be held liable by the Rent

Administrator or Rental Housing Commission, as applicable, for the amount by which the rent exceeds the applicable rent ceiling or for treble that amount (in the event of bad faith) and/or for a roll back of the rent to the amount the Rent Administrator or Rental Housing Commission determines.

Therefore, the hearing examiner's finding that the tenant did not meet her burden of proof in establishing a reduction of extermination services is reversed. This issue is remanded to the Rent Administrator for findings of fact and conclusions of law on the value of the reduction of services and a determination concerning whether the tenant is entitled to a rent refund.² See Kemp v. Marshall Heights Community Dev., TP 24,786 (RHC Aug. 1, 2000) at 10.

C. Whether the hearing examiner erred when he stated that 24 of the 26 outstanding housing code violations in the tenant's unit were abated.

The tenant argues that the hearing examiner ignored her testimony regarding the unabated housing code violations in her unit, including rodent infestation. Therefore, the tenant asserts, his conclusion that 24 of 26 housing code violations in her unit were abated by the housing provider was in error.

In his decision at finding of fact 6, the examiner stated: "An abatement notice for Housing Deficiency Notice No. 81380 was issued on February 2, 1999. That abatement notice was rescinded on May 27, 1999, indicating that abatement of rodent infestation had not been completed, but that twenty-four of the twenty-six violations had been abated." McDonald v. Nuyen, TP 26,124 (OAD July 15, 2002) at 4. The decision further states:

² The services and facilities provision of the Act, D.C. OFFICIAL CODE § 42-3502.11 (2001), provides:

If the Rent Administrator determines that the related services or related facilities supplied by a housing provider for a housing accommodation or for any rental unit in the housing accommodation are substantially increased or decreased, the Rent Administrator may increase or decrease the rent ceiling, as applicable, to reflect proportionally the value of the change in services or facilities.

Petitioner testified concerning a housing inspection conducted on January 10, 2001. However, that inspection was conducted after the filing of the Petition. Thus, Respondent was not put on notice in the Petition that these violations would be at issue in this proceeding. The Hearing Examiner did not consider this Housing Violation Notice.

Id. at 7 n.16.

The notice referred to by the hearing examiner is a letter dated May 27, 1999, from Mr. Donald N. Varner, Supervisory Stabilization Officer, DCRA, Housing Regulation Administration, to General Promotion Tech, in care of, David Nuyen. The letter states:

In regard to the housing deficiency notice written on the property at 4120 14th Street, NW, [sic] apartment #36, notice number (81380), was abated on the record February 9, 1999 in error, item number's [sic] 17 and 26 on the notice have not been abated. Therefore, the housing notice has been re-opened pending complete abatement of the rodent infestation of apartment #36. The record reflects twenty-four of the twenty-six items have been abated.

R. at 87. The tenant did not rebut, with relevant evidence, the statement made in the letter that 24 of the 26 housing code violations listed in Housing Deficiency Notice No. 81380, issued on February 2, 1999, had been abated. At the hearing, the tenant relied on the housing deficiency notices as her proof of the existence of housing code violations. The tenant offered no additional evidence concerning housing code violations except for her testimony regarding rodent infestation.

The tenant submitted as evidence of additional housing code violations Housing Deficiency Notice 588389 (R. 49-52), which details more than two outstanding housing code violations in her unit. However, as stated in the decision, that inspection was conducted on January 10, 2001, and notice of the violations was transmitted to the housing provider on January 11, 2001, after the tenant filed her petition on October 24,

2000.³ Because the housing provider was not put on notice that Housing Deficiency Notice 588389 was at issue in the case, the hearing examiner properly discounted that evidence in making his decision. Therefore, the only reliable and probative evidence in the record was the letter dated May 27, 1999, from DCRA's Housing Regulation Administration, which stated that 24 of the 26 housing code violations listed in Housing Deficiency Notice No. 81380, issued on February 2, 1999, had been abated.

Accordingly, the decision of the hearing examiner on this issue is affirmed and this appeal issue is denied.

D. Whether the hearing examiner erred when he found that the record did not contain evidence of the housing provider's attempts to increase the tenant's rent.

The tenant argues the evidence of the housing provider's attempts to increase her rent are contained in two (2) Complaints for Possession of Real Estate filed in the Landlord and Tenant Branch of the Superior Court by the housing provider.

The hearing examiner stated in his evaluation and legal analysis of the evidence:

Petitioner offered no documentary evidence of the dates on which Respondent gave her notice of a rent increase. Nor did she give testimony as to the amount of the proposed increase or that she paid the proposed increased rent. ... Petitioner's failure to submit evidence that would allow quantification of the amount of illegal rent demanded by Respondent precludes an award.

Id. at 5.

At the hearing the tenant submitted Petitioner's Exhibits (P. Ex.) three (3) and four (4)⁴ (R. at 64-65). P. Ex. three (3) is a Complaint for Possession of Real Estate filed

³ The Commission has held that parties are entitled to sufficient notice of the nature of the hearing to give them an opportunity to prepare. See Shapiro v. Comer, TP 21,742 (RHC Aug. 19, 1993).

⁴ P. Ex. four (4) is a Complaint for Possession of Real Estate filed by the housing provider in the Superior Court of the District of Columbia, Landlord and Tenant Branch on January 25, 2001. This complaint for possession was submitted after the tenant petition was filed on October 24, 2000. The Commission has

by the housing provider in the Superior Court of the District of Columbia, Landlord and Tenant Branch, on September 6, 2000. In the Complaint for Possession, the housing provider indicated that the tenant failed to pay the total rent due from October 1, 1999 through September 30, 2000 in the amount of \$3372.00 or \$281.00 per month. The housing provider also indicated in the Complaint for Possession that he was seeking possession of the tenant's unit because it, "has been sold to another tenant as a condominium."

The substantial evidence in the record (R. 35-36) reflects that on July 22, 1997, by order of Superior Court Judge Keary, the tenant's rent level was reduced from \$459.00 per month to \$309.00 per month, until the housing provider obtained an abatement order from the DCRA, Housing Regulation Administration, Inspection Division. The record further reflects that on August 28, 1998, the Court held that the tenant's rent level was to remain at \$309.00 until such time as the housing provider submitted abatement notices for the housing code violations found in the outstanding Notices of Housing Code Violation. There is no evidence in the record that the housing provider has abated the housing code violations or that the court has rescinded its orders.

The tenant testified at the hearing that she continued to pay the \$309.00 rent ordered by the court. The housing provider failed to produce evidence that the tenant had not paid the rent, which was reduced by the court as a result of the unabated housing code violations.⁵ Therefore, contrary to the hearing examiner's decision, the Complaint for Possession, filed by the housing provider, constituted a demand for rent above the

previously held that it is improper to consider documents or events that occurred after the date the tenant petition was filed. See e.g. Killingham v. Wilshire Investment Corp., TP 23,881 (RHC Sept. 30, 1999).

⁵ The Rent Administrator and the Superior Court have concurrent jurisdiction over housing code issues. See Robinson v. Edwin B. Feldman Co., 514 A.2d 799 (D.C. 1986).

\$309.00 ordered by the court, because the \$309.00 reduced rent and the \$281.00 demanded by the housing provider totaled \$590.00, equaling \$281.00 more than the court's order. The Complaint for Possession established the dates of the demand, from October 1, 1999 through September 30, 2000 and the amount of the demand, \$281.00 per month. The Act, D.C. OFFICIAL CODE § 42-3509.01(a) (2001), provides:

Any person who knowingly (1) demands or receives any rent for a rental unit in excess of the maximum allowable rent applicable to that rental unit under the provisions of subchapter II of this chapter, ... shall be held liable by the Rent Administrator or Rental Housing Commission, as applicable, for the amount by which the rent exceeds the applicable rent ceiling or for treble that amount (in the event of bad faith) and/or for a roll back of the rent to the amount the Rent Administrator or Rental Housing Commission determines. (emphasis added.)

The hearing examiner also erred when he found that the tenant failed to provide evidence that she paid the full amount of the rent demanded. The District of Columbia Court of Appeals held that the fact that the tenant did not pay the full amount of the rent does not limit the refund. See Kapusta v. District of Columbia Rental Hous. Comm'n, 704 A.2d 286 (D.C. 1997). The mere demand violates the Act.

Accordingly, the decision of the hearing examiner on this issue is reversed and remanded to the Rent Administrator for calculation of the refund due the tenant, plus interest, as a result of the housing provider's demand for rent in excess of the maximum allowable rent applicable to her rental unit.

E. Whether the hearing examiner erred when he failed to establish that the tenant was offered the right of first refusal on her unit, in that no evidence was offered at the hearing by the housing provider to establish that the tenant received the proper notice.

The tenant asserts that the hearing examiner erred when he failed to make a finding of fact and conclusion of law on whether she received proper notice of her right of first refusal to purchase her unit at the housing accommodation.

The tenant's right to purchase her unit in the housing accommodation, and the remedies for any violation of her right to purchase her unit are governed by the Rental Housing Conversion and Sale Act, D.C. OFFICIAL CODE §§ 42-3401.01-3405.13 (2001). The jurisdiction of the Rent Administrator and the Rental Housing Commission are found in the Rental Housing Act of 1985, D.C. OFFICIAL CODE §§ 42-3501.01-3509.07 (2001). The right of the tenant to purchase her unit in the housing accommodation and the remedies for violation of that right are not included in the jurisdiction of the Rental Housing Act. See Redmond v. Majerle Mgmt., Inc., TP 23,146 (RHC Oct. 24, 1995); Bridges v. Askin, TP 20,633 (RHC Apr. 26, 1989).

Therefore, the hearing examiner did not err when he failed to conclude, as a matter of law, that the housing provider failed to notify the tenant of her right of first refusal. Because the Rent Administrator and the Commission lack jurisdiction over this issue, this appeal issue is dismissed.

IV. CONCLUSION

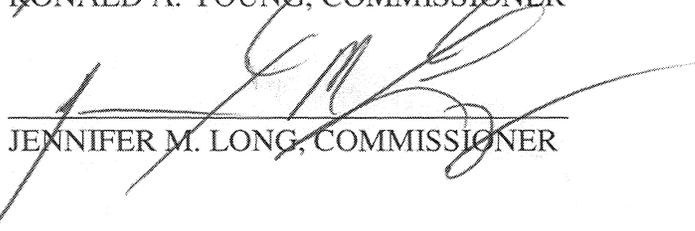
The decision of the Rent Administrator is affirmed in part, reversed in part, and remanded for findings of fact and conclusions of law on the value of the reduction of services and a determination concerning whether the tenant is entitled to a rent refund and for calculation of the amount of refund due the tenant, plus interest, as a result of the housing provider's demand for rent in excess of the maximum allowable rent level set by the court applicable to her rental unit.

On remand, the Rent Administrator shall make findings of fact and conclusions of law on the value of the reduction of services and the amount of refund due the tenant based on the present record. See Wire Properties v. District of Columbia Rental Hous. Comm'n, 476 A.2d 679 (D.C. 1984).

SO ORDERED.


RUTH R. BANKS, CHAIRPERSON


RONALD A. YOUNG, COMMISSIONER

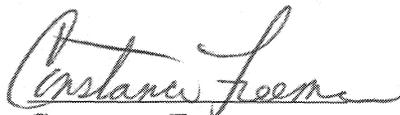

JENNIFER M. LONG, COMMISSIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Decision and Order in TP 26,124 was mailed postage prepaid by priority mail, with delivery confirmation, on this 29th day of August, 2003, to the following persons:

Alynda McDonald
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Constance Freeman
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